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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1525

ALUMINUM COMPANY OF AMERICA, ET AL,

Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,

Respondents.

REPLY BRIEF OF PETITIONERS

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FIDELITY PRINTING COMPANY, HOUSTON

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PRELIMINARY STATEMENT

Respondents' brief reveals the paucity of arguments that can be mustered to support their claims. They do not seriously challenge Petitioners' contention that the outcome of the second trial was never in doubt after the court decided to read to the jury the entire verdict of the first jury as "background." The reaction of the antitrust jury, which was told by the court that a prior jury in a related case had found Petitioners to be monopolists, to have refused to deal with Respondents and to have harrassed them, was predictable. The court later compounded its error by permitting counsel for Respondents to refer throughout the trial and during final argument to the prior jury verdict. It was inevitable that after the jury was told Petitioners had been adjudicated law violators, it would believe

Respondents' witnesses over Petitioners' on the hotly contested issues of fact, and would be strongly influenced to be consistent with the first jury. It was thus no surprise when the jury found that Petitioners' pre-established monopoly had caused the demise of Respondents' proposed extraction plant and awarded the precise amount of damages sought by Respondents.

The unfairness of the court's unprecedented use of the prior verdict is patent. This unfairness is magnified when it is realized that the monopoly verdict, which was repeatedly paraded before the jury, was returned after a trial in which all evidence on Petitioners' market share of the gas drilled, produced and transported in the Appling Field — the markets which the jury found they monopolized — was excluded. The only evidence before the jury of Petitioners' market power was that they leased approximately 85% of the surface area in the Appling Field. This evidence was irrelevant to the issues submitted to the jury. Petitioners' excluded evidence would have shown that ownership of surface acreage had a minimal relationship to actual production of gas.

At the second trial, the court held that the prior verdict constituted a finding of monopolization of the relevant market of the extraction of liquids from natural gas, a market not even submitted to the prior jury. The court then read the entire verdict to the second jury and permitted counsel for Respondents to use it throughout the trial and in final argument. This permitted Respondents to parlay a jury finding of monopolization of the drilling, production and transportation of gas in the Appling Field, which was based on a record devoid of evidence of market power in those relevant markets, into a judgment in excess of one million dollars for monopolization of an entirely different relevant market, the extraction of liquids, even though the

jury did not hold at either trial that Petitioners monopolized extraction.

Finally, the court erred in submitting Instruction 32 to the jury. Instruction 32 was in direct conflict with the law of the case, related to no issue submitted to the jury and was plainly impermissible under the decisions of this Court.

This Court should grant review and order a new trial to prevent a gross miscarriage of justice and a flagrant abuse of the private antitrust treble damage action and to correct errors of the courts below that clearly conflict with holdings of this Court. The Court should reject Respondents' argument that because this case has a long history, the Court should now bring it to an end by refusing certiorari. Even though there have been two trials and two appeals, justice has not been done. Errors that occurred at the first trial were compounded at the second trial, which was conducted by a different judge who was unfamiliar with the case. This Court should exercise its discretion to correct these errors that have greviously harmed Petitioners. Petitioners ask only that they be granted a trial before a jury that hears all the relevant evidence on all the issues and that is not prejudiced against Petitioners at the outset of the trial.

ARGUMENT

I.

The Verdict of the First Jury Should Not Have Been Read to the Second Jury and Counsel for Respondents Should Not Have Been Permitted to Refer Repeatedly Throughout the Trial and in Final Argument to the Prior Verdict.

The weakness of Respondents' position on the jury verdict issue is shown by their meritless arguments that

Petitioners "invited" the court to read the verdict and "waived" their objections to Respondents' counsels' inflammatory use of the prior verdict. These arguments were made by Respondents to the Fifth Circuit and were ignored by that court. (App. 121). Respondents employ these makeshift arguments because they have never been able to cite any authority for the court's unprecedented use of the prior verdict.

Respondents' contention that Petitioners invited error is simply untrue. Throughout the proceedings in the district court, Petitioners objected to any mention of the prior jury verdict in the presence of the jury and to permitting Respondents' counsel to argue from that verdict to the jury. When the trial court first drafted its charge, Petitioners objected to any mention of the prior verdict and objected further to the court's summary of the verdict, which contained omissions and misleading statements. It was then that the court, not Petitioners, decided to again read the entire verdict to the jury. (Court of Appeals Record, 73-1633, p. 3951). Petitioners preserved their objections to that procedure. (Court of Appeals Record, 73-1633, p. 3948-51, 4217).

Respondents next contend that admission of the jury verdict was proper because the court gave cautionary instructions which the jury presumably followed. Even the trial court recognized the fallacy of this argument. It expressly stated that if it erred in reading the verdict, such error would be "irretrievable" because the "inflammatory" nature of the matters contained in the verdict would constitute such "irreparable damage that you couldn't correct it." (Court of Appeals Appendix, 73-1633, pp. 196-99).

Respondents' contention that Petitioners waived their objection to reference by Respondents' counsel in final argument to the prior jury verdict is incredible. Petitioners

clearly preserved on the record during the pre-trial conference and throughout the trial their objections to the jury being told anything about the prior verdict by either the court or counsel. (Court of Appeals Appendix, 73-1633, pp. 195-96; Court of Appeals Record, 73-1633, pp. 275-77, 280-84, 315-16, 377-82). The court clearly recognized that Petitioners were taking this position and indicated to them that they did not need to expand the record by continuing such objections. (Court of Appeals Record, 73-1633, pp. 384-85). It was thus quite clear before the start of the jury argument that Petitioners objected to counsel's making any use of the verdict in the argument and indeed Petitioners forewarned the court as to the type of inflammatory argument Respondents' counsel would make from the jury verdict. (Court of Appeals Appendix, 73-1633, p. 42; Court of Appeals Record, 73-1633, pp. 382-83, 389-96, 398-400, 512, 3948-87). At the close of jury argument and prior to the court's giving its charge, Petitioners moved for a mistrial based on the inflammatory nature of the arguments presented to the jury by counsel for Respondents. (Court of Appeals Record, 73-1633, pp. 4147-48). It is thus clear that Petitioners have not waived their right to complain of Respondents' utilizing the verdict in the final arguments to the jury. *See Keen* v. *Overseas Tank Ship Corp.*, 194 F.2d 515, 519 (2d Cir.), *cert. denied*, 343 U.S. 966 (1952).

The Fifth Circuit held that it was "not error to instruct the jury as to the verdict reached by the first jury in the original trial of the case on the monopolization issue." (App. 121). Although it may have been permissible for the court simply to tell the jury that the monopolization issue had been determined at a prior trial, and that they were only to be concerned with and decide the issues submitted to them, the court did far more.

First, it read the entire verdict that included not only the monopolization issue and the jury's answer, but also

issues and answers on whether Petitioners refused to deal with Respondents' pipeline company and whether Petitioners "harrassed" Respondents in their efforts to build a pipeline. None of these issues had anything to do with any issue in the second trial. Nor was this action necessary to give the jury a "background" on the monopoly issue. Of course, prior judgments obtained by the United States are admissible under certain circumstances in subsequent private antitrust actions, 15 U.S.C. § 16(a). However, there is no statute or case law permitting similar use of prior judgments in cases between private parties. Even in cases involving Government judgments, it has been held that a prior verdict is not admissible to inform the jury of the "background" of the case. *International Shoe Machinery Corp.* v. *United Shoe Machinery Corp.*, 315 F.2d 449 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963).

Secondly, the court even failed to restrict the use of the prior verdict to "background." It permitted Respondents to put on the identical live testimony utilized at the previous trial to prove the conspiracy and monopoly and thereafter provided the jury with the verdict to show how the previous jury answered the issues concerning this testimony. (Court of Appeals Record, 73-1633, pp. 664-75, 1377-80, 1448). Obviously, this action boosted these witnesses' credibility on the issues to be decided in the second trial and conveyed to the jury the message that one jury had already found violations of the antitrust laws after hearing these very same witnesses testify.

Finally, even though the court recognized that the verdict was irrevelant to any issue in the second trial, it allowed counsel for Respondents to use the verdict throughout the trial and to argue that the prior verdict showed how the issues in the second case should be decided. (Court of

Appeals Record, 73-1633, pp. 4029-30, 4045-46, 4131-32, 4139).

Several examples will confirm the inflammatory and prejudicial use of the verdict in final argument. Counsel Mandell told the jury that "this monopoly that was established effectively prevented the deal between Lumar and Southeastern." (Court of Appeals Record, 73-1633, p. 4027). He repeated the message by asking the jury what "frustrated, killed, destroyed" the deal and his answer was "[t]he existing established, legally-established monopoly of Alcoa, Crown and Mr. Appling, there is no more than that." (Court of Appeals Record, 73-1633, p. 4035). Finally, he told them that the previous jury had "foreclosed the question that Mr. Appling, Crown Central and Alcoa had prevented Wolcott from signing the agreement" and then asserted that such determination also told them that the same people had prevented the construction of an extraction plant. (Court of Appeals Record, 73-1633, pp. 4045-46). Mr. Able told the jury that because of the prior verdict there was nothing left for it to decide in this case except the amount of damages that Respondents should be awarded. He said:

> Now, he was not permitted to go forward with that plant because of the activities which the previous jury has found.
>
> . . . The matter of whether they had the agreement between the other parties has been decided, and the fact that I have five minutes to talk to you is an illustration of why we do not have time to retry those matters over and to go into them, ...

(Court of Appeals Record, 73-1633, pp. 4139-40). These inflammatory arguments were followed by the court's once again reading to the jury the prior verdict. This gave the

clear impression that the court was endorsing Respondents' argument that the second jury should follow the lead of the first jury.

Counsel for Petitioners warned the court that counsel for Respondents would use the jury verdict in final argument to show the jury "what the former jury has already done to them so you go ahead and finish the job that this former jury started, that gets to the very most aggravated form of its inflammatory nature." The court said that such use of the prior verdict "might be reversible." (Court of Appeals Record, 73-1633, pp. 3812-13). However, as shown by the above passages from final argument, counsel for Respondents used the prior verdict in the very way that counsel for Petitioners predicted and the court permitted it. The effect was devastating and is grounds for review.

In view of the numerous and effective uses made of the verdict by the court and Respondents' counsel, the Fifth Circuit's statement that the court merely "instruct[ed] the jury as to the verdict reached by the first jury" has little relation to what actually happened. Moreover, the cases cited by Respondents to support the court's action on the prior verdict are not in point. These cases either involve (1) a case tried to the court or decided on directed verdict so that the problem of jury prejudice never arose, *Beetler* v. *Sales Affiliates, Inc.*, 431 F.2d 651 (7th Cir. 1970); *Gottesmann* v. *General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969), *cert. denied*, 403 U.S. 911 (1971) (*Gottesmann* also involved a Government judgment made admissible by statute, 15 U.S.C. § 16(a)); (2) a stipulation by the parties that the prior jury findings be read into evidence, *United States* v. *Bucon Construction Co.*, 430 F.2d 420 (5th Cir. 1970); (3) the use of a prior criminal conviction of a defendant at his subsequent criminal prosecution for the same offense to

show motive, *Cirillo* v. *Commissioner*, 314 F.2d 478 (3d Cir. 1963); or (4) the use of a prior judgment to estop one of the parties from relitigating an issue already determined in a prior case, *Stagecrafters Club, Inc.* v. *District of Columbia Division of American Legion*, 111 F. Supp. 127, 128-29 (D.D.C. 1953). None of these grounds is applicable in the instant case. This case was tried to a jury and there was no stipulation that the prior jury findings be admitted. The prior verdict was not admitted to estop Petitioners from retrying any issue, since they made no such attempt. The court said it was admitting the verdict for "background," not as an estoppel.

The *Gottesmann* court recognized the very problem presented in the instant case. It said that courts should be more inclined to give evidentiary weight to a prior judgment when the "case is being tried to a judge rather than to a jury, thus minimizing the nagging problem of undue prejudice referred to in many of the cases." 414 F.2d at 963-64. The instant case is a classic one involving undue prejudice. Other decisions have recognized that introduction of a prior judgment "merely for its aura of guilt" or to "imply new wrongdoing from past wrongdoing" is erroneous, particularly when the prior judgment has a "potentially high emotive impact on a jury of laymen." *Buckhead Theater Co.* v. *Atlanta Enterprises, Inc.*, 327 F.2d 365, 368 (5th Cir.), *cert. denied*, 379 U.S. 888 (1964); *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F.2d 629, 632 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952). That was precisely the result here and yet the district court's action ignored all these caveats.

Neither Respondents nor the courts below have cited a single case to support the extensive use of the prior verdict by the court and counsel for Respondents. Petitioners sub-

mit that no such case exists. Rather, the cases show that the "emotive impact" and the potential for "undue prejudice" involved when a prior judgment or verdict is disclosed to a second jury is so great that the verdict should not have been admitted for any reason, much less for unlimited use by court and counsel. *E.g., Gottesmann* and *Buckhead Theater, supra.* Petitioners submit, therefore, that this Court should hold that it was error to try this case in such an atmosphere.

II.

The Entry of Two Separate Judgments Upon a Single Cause of Action Is Inadmissible Under the Federal Rules.

This issue was fully developed in the Petition for Writ of Certiorari and thus Petitioners will not argue this point further.

III.

The District Court Should Have Submitted an Antitrust Liability Issue to the Second Jury.

The decisions of the courts below establish the dangerous precedent of permitting a finding of monopolization in one relevant market to be used as the basis for an enormous antitrust award in a case involving a wholly separate relevant market. Their decisions are in direct conflict with decisions of this Court which hold that before an issue can be deemed previously adjudicated, it must be clear that the question was "distinctly put in issue and directly determined . . . ." *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 569 (1951). The question of monopolization of the extraction of liquids from natural gas in the Appling Field was clearly not "distinctly put in issue and directly determined" by the first jury.

The first trial involved the charge by Respondents that violations of Sections 1 and 2 of the Sherman Act by Petitioners had frustrated Respondents' plans to build a pipeline in the Appling Field. At this point, it has been held that Petitioners blocked the pipeline by monopolizing the "drilling for, producing, and transporting gas from the Appling Field." (App. 70, 71). The second trial involved similar charges related to a plant designed to extract liquids from natural gas, a process related to but completely different from drilling, production and transportation. It clearly does not follow that because a company monopolizes the drilling, production and transportation of gas it necessarily monopolizes the extraction of liquids from the gas. Nevertheless, the courts below concluded that the first verdict also decided the issue of monopolization of extraction. This is in direct conflict with the teaching of *Emich, supra.*

The conflict with *Emich* occurs because the court at the first trial excluded all evidence on the extraction plant. (Court of Appeals Appendix, 73-1633, pp. 177, 186). It is thus difficult to comprehend how a jury that did not hear one shred of evidence on the extraction issue could have found by implication, or otherwise, that Petitioners monopolized the extraction of liquids in the Appling Field. Thus Respondents' contention that the first jury's finding that Petitioners monopolized the "transportation" of gas was equivalent to a finding that they monopolized extraction of liquids is not plausible.

It is hornbook law that for an antitrust plaintiff to prevail he must prove three things: (1) a violation of the antitrust laws; (2) injury to his business or property as a result of the antitrust violation; and (3) ascertainable damages. At the second trial, Respondents were only required to prove (2) and (3). This denied Petitioners

their day in court on the antitrust liability issue. This denial resulted from the district court holding that the prior jury had found monopolization of extraction of liquids even though that issue was not "distinctly put in issue and directly determined . . . ." *Emich, supra.* This Court should order a full trial on all the antitrust issues.

IV.

The Trial Courts Should Not Have Excluded All Evidence of Production of Gas from the Appling Field.

Monopolization under Section 2 of the Sherman Act requires proof that establishes the present existence of such market domination that the monopolist has "the power to control prices or exclude competition." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). In *Grinnell*, this Court went on to say: "The existence of [monopoly power] ordinarily may be inferred from the predominant share of the market." *Id.*

At the first trial, Respondents' assertions under Section 2 of the Sherman Act concerned a gas field located on the Texas Gulf Coast called the Appling Field. They asserted that Petitioners had monopolized, attempted to monopolize or conspired with others to monopolize the production and transportation of gas from the Appling Field. Yet they offered not one line of evidence as to the amount of Petitioners' production of gas from the field or as to the total amount of gas produced from the field. They merely proved that Petitioners had leased approximately 85% of the surface acreage in the Appling Field, (Court of Appeals Record, 72-2792, pp. 2655-56), and then argued that this power directly translated into power over 85% of the production in the field. Petitioners offered evidence to show that their ownership of the surface

acreage did not equal a "predominant share" *Grinnell, supra*, of the gas production and that under no theory did Petitioners control a predominant share of gas production in the field. This evidence related to Petitioners' actual share of the gas production in the Appling Field. However, this evidence was erroneously excluded by the court.

Petitioners' evidence on their actual share of gas production in the Appling Field would have destroyed Respondents' monopoly case by acquainting the jury with the economic realities that existed in the field. The economic reality was that while Petitioners owned 85% of the surface acreage of the Appling Field and Respondents less than 1%, the amount of gas they produced was governed by the $^1/_3$-$^2/_3$ rule.* The first effect of the $^1/_3$-$^2/_3$ rule was that Respondents were not confined to producing only the gas that lay under their acreage. Rather, Rspondents were permitted to produce gas from under Petitioners' lands. Thus the $^1/_3$-$^2/_3$ allocation formula in itself gave Respondents' wells a tremendous production advantage over Petitioners' gas units. The advantage was compounded by the fact that the operation of the $^1/_3$-$^2/_3$ allocation formula rendered Petitioners' wells incapable of producing

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* Under the rule, $^1/_3$ of total field production is allocated equally among all wells in the reservoir and $^2/_3$ of the total field production is allocated to each well on the basis of the ratio which the surface acreage upon which each well is drilled bears to the total surface acreage of the field. A more detailed description of the operation of the $^1/_3$-$^2/_3$ proration formula utilized by the Texas Railroad Commission for allocation of production to all wells in the Appling Field is set forth in *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America*, 284 F. Supp. 582 (S.D. Tex. 1968). *See also, Railroad Comm'n.* v. *Woods Exploration & Producing Co.*, 405 S.W.2d 313 (Tex. 1966); *Railroad Comm'n.* v. *Aluminum Company of America*, 380 S.W.2d 599 (Tex. 1964); *Railroad Comm'n.* v. *Shell Oil Co.*, 380 S.W.2d 556 (Tex. 1964); *Atlantic Refining Co.* v. *Railroad Comm'n.*, 346 S.W.2d 801 (Tex. 1961).

even the allowables assigned to them. Petitioners' wells were thus classified as limited capacity wells and the excess production was allocated to Respondents' and other small tract owners' wells. Thus Respondents produced that gas in addition to the original allocation given to them by the ⅓-⅔ rule. That enabled Respondents to produce far more of the reserve allowable than their share as determined by the basic operation of the ⅓-⅔ rule would have given to them. *See Railroad Comm'n* v. *Woods Exploration & Producing Co.*, 405 S.W.2d 313 (Tex. 1966); *Railroad Comm'n* v. *Aluminum Company of America*, 380 S.W.2d 599 (Tex. 1964).

Accordingly, because of the operation of the ⅓-⅔ rule, Petitioners produced only 50% of the gas in the Appling Field while Respondents and the other small tract owners produced the other 50%. Petitioners argued to the trial court that most of these facts were undisputed and that they were of critical importance to the issue of whether Petitioners had monopolized the production of gas in the Appling Field. Respondents argued below and repeat the argument here that the evidence should not have been admitted because they were entitled to produce the gas that they did produce under the ⅓-⅔ rule. Respondents' argument is based on the fact that lawsuits were filed by Petitioners which asserted that the application of the ⅓-⅔ rule, which previously had been declared unconstitutionally confiscatory by the Texas Supreme Court, should be abolished in the Appling Field and that Respondents should not be permitted to produce under the rule. Petitioners ultimately lost both of those decisions in the Texas Supreme Court. Consequently, in the antitrust cases the legality of the production was assumed; and the evidence was offered simply to show that Petitioners lacked monopoly power, since power over acreage did not equal power over pro-

duction and that Petitioners' 50% share of the gas produced in the Appling Field was far too low to support a verdict on monopolization. When this evidence was excluded, it meant that the only evidence before the jury on the issue of monopolization was the percentage of the surface acreage of the Appling Field leased by Petitioners. The jury thus based its finding of monopolization, which was affirmed on appeal, on the simple proposition that 85% ownership of the acreage translated into 85% production of gas from the Appling Field.

This resulted in the incredible finding that Petitioners monopolized production in the Appling Field, a market that was intricately regulated by the Texas Railroad Commission to ensure that each producer in the field obtained his fair share of gas, though it had no evidence before it on gas production in the Appling Field. It is Petitioners' position here that had the jury known the true facts as they existed in the Appling Field they never would have found that Petitioners had monopolized gas production in the Appling Field.

This conclusion follows because the Fifth Circuit and all other courts have consistently held that a market share of 50% is not "predominant," *Grinnell, supra,* and thus cannot support a monopolization verdict. In *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969), the court said, "It appears that something more than 50% of the market is a prerequisite to a finding of monopoly." The court went on to say that Section 2 "has never been found to cover a monopoly in an industry in which the leading firm accounts for less than 70% of the market." *Id.* at 207 n.2.

In *Jack Winter, Inc.* v. *Koratron Co.*, 375 F. Supp. 1 (N.D. Cal. 1974), the court said:

> Even if the Court accepted this evidence as defining a relevant submarket, the only evidence offered which bears on the question of Koratron's percentage share supports an inference that it was at most 42%. This figure does not approach the percentage shares which have been held to be monopoly shares. See United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (87%); International Boxing Club v. United States, 358 U.S. 242, 249 (1959) (81%); American Tobacco Company v. United States, 328 U.S. 781, 797 (1945) (over 67%, over 80%); United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945) (90%).

375 F. Supp. at 68. In *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969), the court cited nine cases in which monopolies have been held to exist. The monopolist's share of the relevant market in each ranges from 70% to 100%. 402 F.2d at 974 n.6.

These cases show that the difference in Petitioners' 85% share of the surface area of the Appling Field and their 50% share of the production of natural gas from the field is critical. If Petitioners had actually produced 85% of the gas in the Appling Field, that figure could support a monopoly verdict while a 50% share clearly would not. The court's exclusion of all evidence of Petitioners' share of production permitted the jury to find that Petitioners monopolized a relevant market on which no evidence had been submitted. This verdict was then used at the second trial as proof of monopolization of an entirely separate and distinct relevant market, *i.e.*, the extraction of liquids from natural gas, which was not put in issue or submitted to the jury at all in the first trial and, indeed, was expressly excluded from consideration by the jury at the first trial. A judgment in excess of one million dollars resulted at the second trial.

The courts' action in excluding all evidence of gas production in the Appling Field directly conflicts with the recent holding of this Court that statistical evidence of market shares is not the only relevant evidence in a monopoly case. *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974). There the Government challenged General Dynamics' acquisition of a coal company. To prove its case, the Government put on statistical evidence that showed a substantial trend towards concentration in the coal industry and that the acquisition had increased the merged companies' share of the relevant market of coal production. These statistics were limited to past production of coal. The defendants put on evidence to show that past production was not the proper criterion for assessing competition in the coal market. Defendants showed that although the acquired coal company's past production was high, its coal reserves were not large and those that it did have were almost entirely committed to long term contracts. Defendants also urged that an examination of the economics of the industry would show that the market structure had changed. Defendants urged that these factors made the acquired coal company far less of a competitive force than suggested by the Government's figures on past production.

This Court held for the defendants. It cited *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), thus making clear that *General Dynamics* was not a departure from existing precedent, for the proposition that in determining the legality of a merger, courts should not look only at statistics but at the "structure, history and probable future" of a market. 415 U.S. at 498. The Court concluded that in view of the limited reserves of the coal company, the long term contracts to which virtually all its coal was committed and other factors, an analysis of the market reali-

ties showed the acquisition would not substantially lessen competition.

General Dynamics highlights the error in the instant case. Here Respondents put on statistical evidence to show that Petitioners leased approximately 85% of the acreage in the Appling Field and argued that this showed a monopoly; however, in contrast with *General Dynamics*, Petitioners were then denied the right to show that because of the "structure, history and probable future" of the market this statistic was irrelevant to the issue to be submitted to the jury — whether Petitioners monopolized the production of gas. If Petitioners had been allowed to put on production evidence, it would have shown that 85% control of surface acreage did not translate into 85% of the production of gas. Petitioners produced only 50% of the gas from the field. Furthermore, Petitioners' evidence on the operation of the ⅓-⅔ rule would have shown not only that percentage of surface acreage did not equal percentage of gas production, but also that production of gas from the field was closely regulated by the Railroad Commission to ensure that all producers obtained their fair share of the gas. Such regulation could have persuaded the jury that it was impossible for a party to monopolize the gas field. Finally, as in *General Dynamics*, the evidence would have shown that Petitioners' gas reserves were not overwhelming because of their rapid depletion by the operation of the ⅓-⅔ rule.

Petitioners clearly should have been permitted to introduce evidence on the production of gas from the Appling Field, since this was the very market they were charged with monopolizing. Moreover, under *General Dynamics*, Petitioners should have been permitted to put on evidence

on the ⅓-⅔ rule to show that in view of the "structure, history and probable future" of the market, Petitioners were not monopolists. If the *General Dynamics* case had been treated as the instant one, the Government would have been permitted to put on its statistical evidence of market concentration and that would have been the end of the case. Defendants would not have been permitted to respond. Clearly, if *General Dynamics* had been handled as the instant case, the result would have been the opposite. The only evidence before the court would have been the Government's statistical evidence of increasing market concentration and the increase in the market share of the merged companies. The evidence on coal reserves and long term contracts, which reflected the market realities, would have been excluded just as all evidence of production and the operation of the ⅓-⅔ rule was excluded in the instant case. Thus a judgment would have been entered that did not relate to the commercial reality of the situation. Clearly, *General Dynamics* holds that this should not occur.

The impact of the excluded evidence, which was highly relevant evidence with probative value, had the requisite harm to Petitioners to warrant a new trial. The decisions clearly teach that a new trial must be ordered whenever the trial court improperly excludes evidence or a defense which is germane to a material issue in the case. As stated in *Kennelley* v. *Travelers Ins. Co.*, 273 F.2d 479, 481 (5th Cir. 1960), the "substantial rights of the party are generally held to be affected where the excluded evidence relates to a material point." Certainly, in this case the excluded evidence was so persuasive that it might have led to a different result. *See Thermo King Corp.* v. *White's Trucking Service, Inc.*, 292 F.2d 668 (5th Cir. 1961).

V.

The Second Trial Court's Instruction 32 Was Wholly Without Basis in Law or the Evidence Presented.

Instruction 32 was wholly unwarranted under *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), and makes a mockery of this Court's consistent jealous protection of the right to seek redress in the courts of the land. *Id.*; *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). This Court should grant review to correct this misinterpretation of and extreme extention of *Trucking*.

Under the *Noerr-Pennington* doctrine, Petitioners had every right to attack before the Texas Railroad Commission and in the courts the Railroad Commission regulations that were permitting Respondents to drain millions of dollars worth of gas from under Petitioners' property. Such actions would only be illegal if they amounted to "shams." *Trucking* and *Noerr*, *supra*. There was no evidence that the lawsuits in the instant case were shams or were used to "harrass and deter [Respondents] in their use of administrative and judicial proceedings so as to deny them 'free and unlimited access' to these tribunals." The courts were not "effectively closed" to Respondents and Petitioners were certainly not made the "regulators of the administrative process." *Trucking* at 511. Respondents had unlimited access to the courts and administrative bodies of the State of Texas and were eventually successful in convincing them to let Respondents operate under rules that permitted them to drain Petitioners' gas. This case thus does not fall under *Trucking*.

Petitioners met to decide what to do about Respondents and other town lot operators who were draining Petition-

ers' gas. These meetings are admitted. They took place because Petitioners had concluded that the operations of the small lot operators, such as Respondents, would cost them 31.6 million dollars in gas over the life of the Appling Field. (Defendants' Trial Exhibit 30). Petitioners thus decided to take whatever legal and administrative action was necessary to prevent such drainage by attacking multiple completions, which they did not believe were contemplated by the applicable Railroad Commission rules, and by challenging administratively and later judicially what they believed to be the unconstitutional operation of the $\frac{1}{3}$-$\frac{2}{3}$ proration formula in the Appling Field. That these actions, if successful, would have curtailed or reduced the town lot operators' gas production provides no justification for Instruction 32. Obviously, a situation in which businessmen meet and decide to take legal action to preserve their own property rights through legal and administrative action does not begin to fall within the prohibition of *Trucking*.

In *Trucking*, a group of truckers set up an organization to oppose all attempts by other truckers to obtain certificates of public convenience and necessity and to oppose all other beneficial rulings that competitors might seek from either the Interstate Commerce Commission or its California equivalent. The group specifically announced to all competitors that they would fight them to the bitter end in the courts and before the state agencies on any application that needed administrative approval and that they would oppose such applications whether they had probable cause to do so or not. That action effectively closed the agencies to all other parties and turned over all legal control to the group of truckers. This is far from the situation in the instant case.

It is clear under *Trucking* that the good faith lawsuits brought by Petitioners who had probable cause to believe

that they would prevail were not illegal. In the first place, Judge Singleton found that the lawsuits were brought in good faith and based on probable cause. *Woods Exploration & Producing Co.* v. *Aluminum Company of America,* 284 F. Supp. 582, 594-95 (S.D. Tex. 1968). This holding was never appealed and thus became the law of the case. At the second trial, Justice Clark even stated that there was no dispute over whether the suits were filed in good faith. (Court of Appeals Record, 73-1633, pp. 206-212, 2371). Petitioners were thus amazed when he decided to give Instruction 32.

An examination of the litigation instituted by Petitioners confirms that Justice Clark should have adhered to his original reasoning and not given Instruction 32. The challenge to multiple completions was filed because Petitioners believed that the Texas Railroad Commission did not contemplate multiple completions in the separate reservoirs of the Appling Field. Numerous lawsuits had to be filed because the Railroad Commission's regulations necessitated a lawsuit each time a permit to drill a well in the Appling Field was sought or the right to challenge the permit would be waived. A test case was instituted, lost in the trial court, won in the Court of Civil Appeals and finally lost in the Texas Supreme Court. *Benz-Stoddard* v. *Aluminum Company of America,* 368 S.W.2d 94 (Tex. 1963). When this test case was lost, all the other multiple completion cases, which had been permitted to lie dormant, were dismissed. (Court of Appeals Record, 73-1633, pp. 3085-86).

Petitioners have already acquainted the Court with the operation of the ⅓-⅔ proration formula in the Appling Field. In March 1960, they challenged the validity of that proration order before the Railroad Commission because

they believed that the operation of the formula in the Appling Field was confiscatory and denied them their right to produce their fair share of the gas, in that it was permitting the uncompensated drainage of their gas by town lot operators, such as Respondents, who owned a minute amount of acreage. (Court of Appeals Record, 73-1633, pp. 3091-98, 3108-17). Petitioners' witnesses testified that after they saw engineering studies showing that they stood to lose 31.6 million dollars over the life of the field from this uncompensated drainage, they decided that substantial legal expenditures were justified for taking whatever steps were necessary in the courts and before the Railroad Commission to protect their gas in the Appling Field and to secure their fair share of production in that field. (Court of Appeals Record, 73-1633, pp. 2348-86, 2394-95, 2426-27, 2434-40, 2474-83, 2512-19, 2528-32, 2550-59, 3153-63, 3366-67, 3372-81, 3392-93). When the Commission refused to rescind the order, Petitioners filed a suit in the spring of 1961 challenging the proration formula. Petitioners were successful in the trial court and in the Court of Civil Appeals. While the Texas Supreme Court agreed that the formula was confiscatory and invalid, it held against Petitioners solely on a finding of laches. *Railroad Comm'n* v. *Aluminum Company of America,* 380 S.W.2d 599 (Tex. 1964).

At trial, Respondents put on no evidence that the legal actions discussed above were brought in bad faith and, as discussed below, argued throughout the trial that these lawsuits were irrelevant to the issues being tried. Instruction 32 thus permitted the jury to find that good faith lawsuits brought on the basis of sound business judgments were "shams." This instruction was entirely unwarranted under *Trucking; Pennington;* and *Noerr, supra,* which

have carefully carved out a narrow category of lawsuits that generate antitrust liability. Instruction 32 expands this category immensely.

Instruction 32 not only erroneously stated the law, but also there was no issue to which it related, since the trial court had excluded antitrust violation issues from the case. Therefore, under the questions propounded to the jury, this instruction, if it related to any issue, could only relate to the causation issue. The instruction was given at Respondents' request and one would surmise that they were contending that the lawsuits were "constituent elements of an unlawful scheme," that caused the extraction plant not to be built.

In fact, however, this was never Respondents' position. Respondents asserted and attempted to show that it was Mr. Appling's invocation of the clause in his right-of-way agreement with Lumar that caused no plant to be built. It was *Petitioners* that contended that if there ever was a deal for an extraction plant, it had not gone through because at the time negotiations were taking place the validity of the ⅓-⅔ proration formula was being litigated before the Texas Railroad Commission and the validity of multiple completions in the Appling Field was being litigated in the courts of Texas.

Petitioners urged that these viable legal challenges to Respondents' gas supply rendered the extraction plant wholly unfeasible so that neither Respondents nor Lumar would have gone ahead with it and, that even if they had wanted to, no banker would have loaned them the money. Respondents' counsel and witnesses vehemently denied these propositions and objected throughout the trial that any reference to these legal actions was irrelevant and

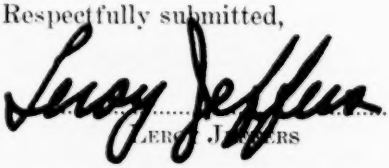
immaterial. (Court of Appeals Record, 73-1633, pp. 570-71, 804, 827-28, 996-97, 1131-32, 1251, 1348, 1444-46, 4026, 4037, 4045, 4135). In that posture there was no contention made and clearly no evidence advanced by Respondents to support Instruction 32. The instruction was thus especially harmful and unwarranted in that it told the jury, ironically, that even if they accepted Petitioners' theory of the case they could still hold for Respondents by finding that the lawsuits were "illegal." This was all despite the fact that Respondents never contended that the lawsuits caused the plant not to be built.

This Court should grant review on the issue of Instruction 32 to correct the trial court's gross extension of and misinterpretation of *Trucking*. In *Trucking*, this Court made it clear that it was extremely protective of the right to bring lawsuits, and it was simply applying the "sham" exception recognized in *Noerr*. In the instant case, the lawsuits brought by Petitioners were not shams. First, the trial court itself stated early in this case that the suits were brought in good faith. Secondly, the prior trial court held that they were brought in good faith with probable cause. Thirdly, the evidence showed that they were brought to prevent confiscation of 31.6 million dollars worth of Petitioners' gas. Finally, these lawsuits were won in three out of the six courts that considered them. In the ⅓-⅔ lawsuit, the Texas Supreme Court agreed with Petitioners' position and denied relief only because of laches. It is thus clear that these lawsuits were not shams.

CONCLUSION

For the reasons stated in this brief and in Petitioners' Petition for Writ of Certiorari, the Petition should be granted, the judgment of the Court of Appeals reversed, and the entire case remanded to the trial court for a single trial on the entire action.

Respectfully submitted,



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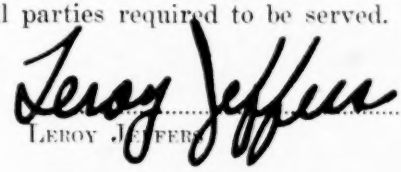
CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1, of this Court, three copies of the foregoing Reply Brief of Petitioners were served upon Mr. Levert J. Able, 1201 First National Life Building, Houston, Texas 77002 and Mr. Herman V. Wright, Mandell & Wright, 1901 First National Life Building, Houston, Texas 77002, Counsel for Respondents, by placing the same in the United States mail, first class postage prepaid this 12 day of July, 1975, thus serving all parties required to be served.



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